No. 43639-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOSEPH M. LOWE,

Appellant,

v.

PCL CONSTRUCTION SERVICES, INC., and WASHINGTON DEPARTMENT OF LABOR & INDUSTRIES,

Respondents.

# BRIEF OF APPELLANT

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The trial court erred when it awarded the self-insured employer $1,161.65 in costs for court reporter transcription of perpetuation depositions taken for use before the Board of Industrial Insurance Appeals. These Board incurred costs were awarded by the trial court in the Superior Court appeal under RCW 4.84.

## II. Statement of the Case

On June 18, 2007 Mr. Lowe suffered an industrial injury while employed as an iron worker with PCL Construction Services, Inc (PCL), a self-insured employer. Following his injury and subsequent surgery he was enrolled in a work hardening program during which time he began to experience additional pain in his left hip. Mr. Lowe claimed that his left hip condition was casually related to the June 18, 2007 injury under the Industrial Insurance Act. Clerk's Papers (CP) 1. The Department of Labor & Industries (Department) denied his left hip related claim. Mr. Lowe appealed to the Board of Industrial Insurance Appeals (Board).

During proceedings for the Board, the self-insured employer, PCL, took perpetuation depositions of several witnesses including Dr. David Millett, Dr. Marvin Brooke, Dominique Martin-Mitchell, and Kim Bisson. *See* CP 11-13. Pursuant to WAC 263-12-117 these deposition were made

a part of the Board record for Mr. Lowe's appeal from the Department's negative determination regarding left hip allowance. The Industrial Appeals Judge assigned to hear Mr. Lowe's appeal issued a ruling in favor of PCL. This favorable ruling for PCL was confirmed when the Board denied Mr. Lowe's petition for review on January 5, 2011. CP 1. Mr. Lowe then appealed to Pierce County Superior Court in accordance with RCW 51.52.110.

On March 27, 2012, Judge Stephanie Arend issued a decision in favor of PCL, finding Mr. Lowe's left hip condition to be unrelated to his industrial injury. CP 1-4. In making her decision, Judge Arend considered the Certified Board Record, which included the depositions of Dr. Millet, Dr. Brooke, Ms. Bisson and Ms. Martin-Mitchell. CP 1-4.

Following this decision, on April 20, 2012, PCL filed an amended cost bill requesting $200 in statutory attorney fees and claiming $1,161.65 in court reporter costs for the depositions used in the Board Hearing of Dr. Millet, Dr. Brooke, Ms. Bisson and Ms. Martin-Mitchell. CP 11-13. Judgment was entered on April 27, 2012, awarding $1,361.65 in costs and attorney fees to PCL. CP 16-19. In response Mr. Lowe filed a motion for reconsideration objecting to the court reporter costs awarded to PCL. CP

21-27. The motion was denied by Judge Arend (CP 46-47) and this appeal followed.

## III. Argument

### A. Standard of Review

The meaning of a statute or court rule is a question of law. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P.3d 4 (2002). The Court's fundamental objective in interpreting a statute is to ascertain and carry out the intent of the legislature. *Id.* at 10. Here, the only question is the statutory authority of the Superior Court to award, as costs in a superior court appeal from the Board, the cost of transcribing a perpetuation deposition. This is a pure issue of law and interpretation of RCW 51.52 and 4.84. Thus the Court's standard of review is de novo. See *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009) (meaning of RCW 4.84.330 is a question of law reviewed de novo).

### B. RCW 4.84 authorizes only those costs uniquely incurred during a superior court action.

Washington allows an award of certain costs to a prevailing party in any action before superior court. RCW 4.84.030. The only costs

allowed, without independent statutory authorization, are those costs defined in RCW 4.84.010, which provides:

> The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party's expenses in the action, which allowances are termed costs. Including in additional to costs otherwise authorized by law, the following expenses.
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> * * *
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> (7)To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial or at the mandatory arbitration hearing: PROVIDED, that the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for the purpose of impeachment.

RCW 4.84.010. There is no authority allowing for the award of the costs of transcribing depositions in an industrial insurance appeal. Respondent PCL relies exclusively on RCW 4.84.010 in support of its claim for costs.

RCW 4.84.010(7) does not allow deposition transcription costs in all instances. Instead it imposes certain restrictions on the allowance of those costs. First, the costs must be found to be "necessary to achieve the successful result." Second, the deposition must actually be used at trial.

The success of the PCL before the superior court was wholly dependent upon the record made at the Board. These depositions had already been transcribed, and the expense already incurred long before

PCL ever knew a superior court appeal was forthcoming. In workers compensation cases, the superior court acts not as a trial court, but sits only in an appellate capacity. RCW 51.52.115. These claimed costs would have been incurred notwithstanding Mr. Lowe's superior court appeal. There was no additional cost to PCL for the Superior Court to review these depositions in its appellate capacity. Although the content of the depositions may have contained proof of PCL's case, this does not establish the necessity of incurring the transcription costs for the purpose of the superior court appeal. In fact such costs were unnecessary for success before the Superior Court, because the transcription costs had already been incurred before the Board.

RCW 4.84.010 specifically states "there shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party's expenses *in the action*." Washington Courts have repeatedly noted that the depositions must both have been taken and used for trial purposes. *Kiewit-Grice v. State*, 77 Wn. App. 867, 874, 895 P.2d 6 (1995) ("A party is entitled to the costs of taking depositions if the depositions were taken and used for trial purposes."); *Tombari v. Blankenship-Dixon Co.*, 199 Wn. App. 145, 150, 574 P.2d 401 (1978) (costs awarded because "the record indicates these depositions were taken and used for trial purposes."); *Most*

*Worshipful Price Hall Grand Lodge of WA v. Most Worshipful Universal Grand Lodge*, 62 Wn.2d 28, 43, 381 P.2d 130 (1963) (Deposition admitted into evidence at trial, Court declined to presumed it was not taken for trial purposes when taken in the normal course of discovery). This language highlights the purpose of RCW 4.84: to shift only those costs actually incurred in presenting one's case to the superior court in its capacity as a trial court of original jurisdicition. The need for this analysis is obvious, the mere use of a deposition at a trial is insufficient to award costs, unless the deposition was taken for the purpose of that trial. Here, the depositions in question were not taken "in the action" before the Superior Court, thus transcription costs are not recoverable.

Before the Superior Court, both PCL and the Department of Labor & Industries argued that the mere use (or, more accurately, re-use) of the depositions in the Superior Court proceeding is sufficient to justify an award of costs. RCW 4.84 was not intended to shift costs which were not incurred during a superior court action where the court was not acting as a court of original jurisdiciton. Thus, it applies to depositions taken in the normal course of discovery during a civil claim, but not those depositions which are taken for purposes wholly related to an administrative record that is appealed. Here, the depositions were taken long before the superior

court appeal was filed, in an entirely different forum, and were necessary in the administrative forum regardless of any subsequent superior court appeal. There is no reason to believe the cost of transcription comes within the intended purview of RCW 4.84.010(7).

Although the depositions taken in this case were considered by the superior court in making its decision, they were only considered as part of the administrative record. PCL incurred no cost in presenting the depositions to the superior court, as the depositions were transmitted by the Board with no additional expenses charged to PCL. See RCW 51.52.110. By its plain language, RCW 4.84.010(7) is intended to limit an award of costs to those incurred by the party in actually presenting its initial case. No Washington court has ever held that RCW 4.84 allows for an award of costs incurred during a superior court appeal on the record created at an administrative hearing.

### C. Depositions taken during Board proceedings are inherently different from depositions taken in a civil trial, even if considered in a superior court appeal.

Board procedure allows for the presentation of evidence by deposition, rather than live testimony, even without a showing of witness unavailability for trial. *See* WAC 263-12-117 ("industrial appeals judge

may permit or require the perpetuation of testimony by deposition"). Board procedural rules also establish that the depositions become an inseparable part of the Board record.

> Deposition may be appended to the record as a part of the transcript, and not as an exhibit, without the necessity of being retyped into the record.

WAC 263-12-117(4)(e). The depositions are incorporated into the Board transcript and are treated as the equivalent of live testimony before the Board. Thus when the Board record is transmitted to the superior court, the depositions are not attachments or exhibits, but an inseparable part of the hearing transcript. This use of the depositions saves the Board the trouble and expense of retyping the depositions into the hearing transcript. The result is the essential nature of the depositions are altered. They become the Board transcript, and are no longer considered to be stand alone depositions. The testimony is simply part and parcel of the administrative record.

The Board record which serves as the evidentiary basis for any appeal to superior court is defined as the "notice of appeal and other pleadings, testimony and exhibits, and the board's decision and order." RCW 51.52.110. This record is provided to the superior court not by the

parties, but by the Board, and at no cost to the parties. RCW 51.52.110 provides:

> The board shall serve upon the appealing party, the director, the self-insurer if the case involves a self-insurer, and any other party appearing at the board's proceeding, and file with the clerk of the court before trial, a certified copy of the board's official record . . . which shall become the record in the case.

It is important to note that no additional evidence may be presented to the superior court appeal, absent procedural irregularities in the Board proceeding. RCW 51.52.115. So, depositions for use in the superior court are simply unavailable, procedurally, on appeals from the Board.

It is standard procedure, mandated by regulation, for the parties before the Board to bear their own costs in presenting such deposition testimony. WAC 263-12-117(2) ("Each party shall bear its own costs except when the industrial appeals judge allocates costs to parties or their representatives"). There is no other provision in Board regulations which allows for payment of hearing related costs to the prevailing party.

**D. An award of transcription fees for perpetuation depositions taken during Board proceedings is incompatible with the Industrial Insurance Act.**

The Washington Industrial Insurance Act does specifically allow an award of attorney and witness fees as costs in particular situations. RCW 51.52.130(1). The imposition of costs and fees in workers compensation cases is wholly controlled by this statute. This statute allows a claimant who prevails in a superior court appeal to be awarded attorney and witness fees from the state administrative fund if the worker's right to benefits is sustained and the accident or medical aid fund is affected. Similarly, if an appeal is filed by the Department or self-insured employer, and the injured worker prevails, attorney and witness fees are awarded. *Id.* There is no corollary provision allowing fees to be awarded the Department or a self-insured employer, should a worker's appeal fail. See *Seattle School District No. 1 v. Labor & Industries*, 116 Wn.2d 352, 363-64, 804 P.2d 621 (1991). The court explained the rationale behind allowing awards of attorney fees and costs to injured workers, but not employers, holing:

> Employers and employees are not similarly situated with respect to the purpose of the Industrial Insurance Act attorney fee provision. Employees are allowed to collect attorney fees in order to avoid diminution of their award. *Harbor Plywood*, 48 Wn.2d at 559. The individual employee receives an award to compensate the employee for personal injuries. Moreover, such injuries often involved permanent disabilities which render the employee financially dependent on such awards. Therefore, attorney

> fees may have a substantial impact on the employee. By contrast, employers are not incapacitated and may simply treat attorney fees expended in industrial insurance actions as a cost of doing business, passing the costs on to the ultimate consumer. Disabled employees have no such option.

Had the legislature intended to allow collection of deposition costs in a superior court appeal which were incurred by employers at the Board hearing, the legislature would have specifically authorized the recovery in the Industrial Insurance Act.

The very purpose of RCW 51.52.130 is to provide an injured worker with a means of adequately presenting a claim on appeal without incurring legal expenses which could substantially reduce the award. *Johnson v. Tradewell Stores*, 24 Wn. App. 53, 600 P.2d 583 (1979). Allowing an award of transcription costs to an employer on superior court appeals has the opposite effect. It will chill the right of an injured worker to appeal to superior court by imposing a cost shifting scheme for actions taken in Board proceedings. Such a procedure is in direct contravention to the court's interpretation of the Industrial Insurance Act.

It is notable that no Washington Court has specifically addressed an award of transcription costs in an industrial insurance appeal. In *Black v. Dep't of Labor & Indus.*,131 Wn.2d 547, 557, 933 P.2d 1025 (1997),

the court noted that RCW 51.52.140 and RCW 4.84 allow an award of $200 in attorney fees for services rendered before the superior court. See also *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 422-23, 832 P.2d 489 (1992). These attorney fees were awarded for services rendered before the superior court. Nowhere is there any suggestion that a court may award transcription costs incurred during the prior administrative proceeding.

There is no suggestion in either case that the award of attorney's fee is for services both before the Board and before the superior court. The attorney fee was awarded strictly for services rendered before the superior court. Before the Board, PCL is expected to bear the burden of transcribing deposition as these costs would have been incurred even if no superior court appeal is filed. RCW 4.84 provides no indication of an intent by the legislature to alter the cost bearing scheme inherent in the Industrial Insurance Act.

It has long been the law in Washington that the Industrial Insurance Act is a remedial statute which should be interpreted in favor of injured workers. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 16 P.3d 583 (2001). "Where reasonable minds can differ over what Title 51 RCW provisions mean ... the benefit of the doubt belongs to the injured

worker." *Id.* at 811. As such any ambiguity in the meaning of RCW 51.52, RCW 4.84 and WAC 263-12-117 should be resolved in favor of the injured worker.

### D. Mr. Lowe claims attorney fees for prosecuting this appeal from the superior court.

RCW 51.52.130 provides, in relevant part:

> If, on appeal to the superior or appellate court from the decision and order of the Board, said decision and order is reversed or modified and additional relief is granted the worker or beneficiary... a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court.

RAP 18.1 (a) and (b) requires this request for attorney fees and costs on appeal to be included in appellant's opening brief.

Mr. Lowe seeks relief from the costs that were imposed below on motion of the self-insured employer. If successfully challenged, overturning the award of costs should result in award of reasonable attorney fees incurred by Mr. Lowe's attorney in the effort.

## IV. Conclusion

PCL took four depositions in the course of defending Mr. Lowe's appeal to the Board. PCL chose to incur these costs knowing that the Industrial Insurance Act contained no cost shifting provision, and required

them to bear the burden of these costs. These depositions then became a part of the Board transcript and lost their identity as individual depositions traceable to PCL's transcription expense. When the Board provided these depositions to the Pierce County Superior Court for consideration, it provided the entire record as the Certified Board Record. PCL was charged no fee by the Board as a result of Mr. Lowe's appeal to superior court.

The Industrial Insurance Act also specifically has cost shifting provisions for attorney and witness fees should an injured worker prevail in a superior court appeal. RCW 51.52.130. These measures exist for the purpose of ensuring both adequate legal representation of workers and full compensation to the worker in the event of a positive determination. The legislature made no provision for the employer to recover its attorney or witness fees, and made no provision allowing an employer to recover costs incurred during the Board proceedings. There is no justification for reading into RCW 4.84 an intent to shift deposition costs when the legislature, through the Industrial Insurance Act, has declined to do so.

The legislature has sought to shift certain costs incurred in the course of an action before a superior court to the prevailing party. There is no indication that these provisions were meant to also include costs

incurred *prior* to the filing of a superior court action. PCL incurred no additional transcription costs as a result of Mr. Lowe's appeal to the Superior Court. The mere fact that the administrative record was considered by the Superior Court in making its decision does not mean costs incurred before the Board are transformed into Superior Court costs.

The PCL is attempting to impose a penalty of Mr. Lowe for filing a superior court appeal, by demanding payment of costs incurred during a prior administrative proceeding. Such an award would shift the burden of costs established under the Industrial Insurance Act, with no clear intent to do so from the legislature. Attorney fees should be payable to appellant pursuant to RCW 51.52.130, for protecting appellant from imposition of these costs.

DATED this 6th day of September, 2012.

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## CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Appellate on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 6th day of September, 2012, at Tacoma, Washington.

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